## APPENDIX.

In order to show the proceedings in the District Court, after the first appeal which resulted in a reversal and remand, with respect to the denial of the petitioner's right to cross-examine adverse parties and witnesses, all pertinent portions of the record, with respect to the attempted cross-examination, are here reproduced, as follows:

(References are to the record on the second appeal, Case No. 10455, designated R. 2d).

Pages 39-40:

"Mr. Blackwell (Attorney for petitioner-defendant-owner):

The defendant moves the Court for leave at this time to recall witnesses of the plaintiff for further cross examination, in view of the holding of the Master at prior hearings, that the architect's certificates were concluded,—the defendant hereby making application for leave to recall plaintiff's witnesses for the purpose of re-cross examining them as to the quantity, amount and reasonable value of all items of labor and material that has gone into the job or is proper to have been incorporated in the job, and as to all materials that are purported to have been specially fabricated, as to all purported subcontractors.

Mr. Lake (Attorney for Arnold Construction Company, plaintiff-contractor):

To which motion the plaintiff objects on the ground that the motion is too broad and does not specify any particular witness; secondly, on the ground that at the prior trial of this case no witness, other than J. W. Arnold, was precluded from being further cross-examined on account of the Master's ruling.

The Court:

The motion is denied, except as to J. Y. Arnold, who will be allowed to be cross-examined as a recalled witness. This ruling, however, is not to interfere with the right of the

defendant to go into the matter as combating the prima facie effect of the matters already indicated by the Court.

Mr. Blackwell:

The defendant moves the Court for clarification of the ruling just made with respect to Rule 43-B in regard to calling for cross-examination any adverse party, or officer or director or managing agent or member of a partnership.

The Court:

Outside of Mr. J. Y. Arnold you can call any witnesses you want to, but you make them your witnesses. The line is laid down according to what I have already ruled, and you must adhere to that ruling.

Mr. Blackwell:

Will your Honor rule that the ruling that has just been made in connection with the cross-examination of adverse witnesses will not preclude us from resorting to Rule B to any extent that it may be applicable?

The Court:

You bring your witnesses on. I do not care to make any ruling in regard to what I am going to allow on cross-examination until the witnesses come on. I do not care to make any ruling in advance, however, I am not going to deprive you of any rights you have under the rules.

Pages 545-547:

Mr. Blackwell:

The defendant now desires to call Mr. Maurice Fatio under Rule 43B as an adverse witness for cross-examination, Mr. Fatio having intervened in this case as a member of the firm of Treanor & Fatio, the architects, and has pending here a claim against this defendant growing out of the same transaction.

Mr. Lake:

To which the plaintiff objects, your Honor, on the ground that Mr. Fatio has heretofore been called to testify in this

case and has heretofore been cross-examined, and your Honor, in his ruling at the opening of this case on the second trial, ruled that nobody could be recalled for cross examination except Mr. J. Y. Arnold; secondly, on the ground that Mr. Fatio is not now a party to this case, a severance having been granted in his intervention.

The Court:

I rule that the defendant may call Mr. Fatio under the allegation made as an unwilling or hostile witness, but as an adverse I rule that he is not an adverse party as against Arnold Construction Company, so I think the extended right of examination extends to the propounding of leading questions, but not to impeach him, and rules on the offer by the defendant to examine Mr. Fatio under Rule 43B,—the ruling being that the assertion of the defendant's counsel that Mr. Fatio is an unwilling or hostile witness is recognized as a basis for ruling that the examination may proceed by asking him leading questions. The Court understands that the defendant likewise claims the right to examine Mr. Fatio as a member of the partnership of Treanor & Fatio as an adverse party.

The Court is of the opinion that since we are hearing evidence at this time on the claim of Arnold Construction Company, that the claim of Treanor and Fatio as an intervener is not being heard. The merits of the intervention are not before the Court at this time and, as I understand, Mr. Blackwell is not seeking to examine Mr. Fatio with regard to the merits of the intervention, but solely in regard to the merits of the claim of Arnold Construction Company. For that reason the Court is of the opinion that the witness Fatio, insofar as the claim of Arnold Construction Company is concerned, is not the claim of an adverse party, and therefore the right to seek to impeach the witness is denied.

Mr. Blackwell:

Now I would like to have the record show a motion on behalf of the defendant Franklinville Realty Company to strike the petition for intervention, the order permitting

the intervention and all proceedings incident to the intervention of Treanor and Fatio as adverse parties to the Franklinville Realty Company in this connection, in this action.

The Court:

That is denied.

Mr. Blackwell:

The defendant, in view of the Court's ruling, and being unwilling to examine this witness under such circumstances as to be bound by his testimony, and being unwilling to proceed and examine the witness under any condition except as an adverse witness under Rule 43B, nevertheless proffered to proceed to examine the witness for the purpose of making a record pursuant to rule 43C, which rule places upon the party in a case tried without a jury the privilege of putting in evidence the testimony upon which he will rely, and although the Trial Court may disregard the testimony, it is nevertheless proper under the rule, as we understand it, to have it brought out for the record and for further proceedings in the case.

The Court:

Do I understand, Mr. Blackwell, that under the last sentence of Rule 43C, you are requesting the Court to grant you the privilege of developing your proffer by question and answer form?

Mr. Blackwell:

Yes, sir.

The Court:

That is granted.

Thereupon: Maurice Fatio was called for examination in accordance with the foregoing ruling of the Court, and was examined and testified as follows:

Pages 550-555:

Mr. Lake:

If your Honor please, I object to the question on the ground that it is immaterial, irrelevant and incompetent, and it has no bearing on the issues involved in this case.

The Court:

He is making a record, Mr. Lake.

Mr. Lake:

I just want to reserve my exception.

* * * * * * *

The Witness:

I want to ask if my testimony here as a witness can be used as evidence in the case between Franklinville Realty Company and Treanor & Fatio.

The Court:

What case do you refer to?

The Witness:

I have been served with a paper to appear in a New York Court in a suit of Franklinville Realty Company against Treanor & Fatio in connection with the erection of this building.

The Court:

Do I understand correctly now that you, as a member of the firm of Treanor & Fatio—that is a partnership is it?

A. Yes, sir.

The Court:

And you have stated that in the State of Florida you have been served with process in a suit pending in the State of New York.

The Witness:

Yes, during my attendance on this Court here.

The Court:

In what Court is that suit pending; do you happen to know?

Mr. Williams (Attorney for defendant-owner):

In the United States District Court for the Southern District of New York.

The Court:

When were you served with papers in that suit?

A. I don't recall the date, but it was during one of the sessions here. I received a telegram from my partner, Mr. Treanor, stating that he had been served in New York.

The Court:

So you yourself were not served; in other words, your partner was served?

A. Yes, but as a partner I am a party to the suit.

The Court:

Have you employed counsel in that case?

A. I have.

The Court:

Is your counsel present here at this hearing?

A. No, sir.

The Court:

Is that Florida counsel or New York counsel?

A. New York counsel.

The Court:

Now, Mr. Fatio, do you claim the privilege of not answering questions which may be propounded to you by Mr.

Blackwell or his associates as counsel for the defendant because it may have some bearing on the pending litigation in the New York District Court?

A. That is what I mean, Judge.

The Court:

The question before the Court is ruling upon whether or not the witness will be allowed his privilege.

Mr. Blackwell:

I would like to ask a few questions of the witness at this point for the purpose of the record.

The Court:

All right.

Mr. Blackwell:

Mr. Fatio, isn't it a fact that you were in attendance upon this Court here in Miami under a subpoena served on you on behalf of the defendant before you received the telegram from New York advising you of the suit up there?

The Witness:

That is right.

Mr. Blackwell:

And the action in New York is a civil action?

The Witness:

Yes, sir.

Mr. Blackwell:

You don't contend that it is a criminal action of any kind instituted against you?

The Witness:

I don't know anything about it at all.

(Legal argument.)

The Court:

The Court has heard oral argument and concludes that the witness' attorney, who represents his partnership as an intervener in this case, should be given an opportunity to advise him on the question now before the Court, so action on the claim of privilege of the witness is reserved until tomorrow morning at 9:30.

Mr. Blackwell:

I now want to call Mr. Frederick G. Seelman.

Thereupon: Frederick G. Seelman was called to the stand and examined as follows:

Mr. Blackwell:

Q. Mr. Seelman, you have heretofore testified in this case that you were a member of the partnership of Treanor & Fatio, architects, at and during the time of the partial construction of the Franklinville Realty Company house at Palm Beach, Florida.

A. I have.

Q. And a member of the partnership of Treanor & Fatio that has intervened in this case to claim a lien against the property?

A. I am.

Mr. Blackwell:

Now the defendant, invoking again rule 43-B asks permission of the Court to call the witness who is now in the box as an unwilling and hostile witness and as an adverse party, for the purpose of cross-examination, with the right to impeach the witness or to contradict him under the terms of that rule.

Mr. Lake:

To which motion the plaintiff makes the same objection as heretofore interposed as to Mr. Fatio.

The Court:

The same ruling in the case of Mr. Fatio when he was tendered as a witness.

Mr. Blackwell:

In view of the Court's ruling, the defendant makes the same application as was made in regard to the testimony of Mr. Fatio, and asks leave to interrogate the witness by way of a proffer for the purpose of making a record under the provisions of Rule 43-C.

The Court:

That is granted.

Mr. Blackwell:

Q. Mr. Seelman, how long have you known Mr. R. B. Strassburger, president of the defendant corporation?

The Witness:

Your Honor, I don't want to answer these questions.

The Court:

You don't want to answer these questions?

The Witness:

No, sir.

The Court:

Because of what?

The Witness:

The same reason that Mr. Fatio gave.

The Court:

I make the same ruling. Action on it will be deferred until tomorrow morning at 9:30.

Pages 632-635:

Mr. Blackwell:

I now wish to call Mr. Fatio.

Mr. Baugher (Attorney for Treanor-Fatio-Seelman, intervening plaintiffs):

On behalf of this witness, it is my understanding that he has been called here as an adverse witness by the defendant Franklinville Realty Company in this case. I, as his attorney, object to his being called as an adverse witness in this cause on the theory that in the original trial he was called by the counsel who then represented the defendant, and at that time they admitted that he was not an adverse witness. I can quote briefly, if you wish, from the statements made by counsel who represented Franklinville Realty Company at that time before the Master.

The Court:

I have ruled that he was not an adverse witness, and that he is being called as their witness. When the Court ruled that he was not an adverse witness, Mr. Blackwell tendered him as an unwilling witness, and the subject matter of his proposed examination was made clear to the Court. I have forgotten just in what manner it developed, but it was not in connection with the matter that I am now trying between Arnold Construction Company and the Franklinville Realty Company, and upon the Court ruling that his examination would be immaterial Mr. Blackwell requested the Court to allow the interrogation to proceed by question and answer form, to develop the proffer, because he is making his record, including the excluded testimony, and it was during the proceedings when the witness was being questioned by question and answer form that the witness asked the Court as to whether or not answers he would make would be binding on the defendants in a lawsuit pending in the State of New York, in the Federal Court, and I understand there was developed with some definiteness the proceedings in which this partnership of Treanor & Fatio were parties, and then

in your absence (no one appearing here as counsel for him), we deferred it until today so that the Court could determine whether he should be interrogated over his objection, because of the possibility that what might be developed might be brought out to be material to the New York litigation.

Mr. Baugher:

Right on that theory, I object to the interrogation of the witness at this time because in the early history of the present case the partnership intervened in this case for the purpose of protecting their rights for some sum of money due them for services which they had rendered. Sometime subsequent to the intervention and the answer thereto about four attempts were made before this Court to file an amended answer or counterclaim. Each of these attempts was presented to the Court and the Court fully considered them, and the defendant was denied the requested amendments. That case now stands on the intervening petition and the original answer of Franklinville Realty Company. After that ruling, the defendant being unable to avail itself of some alleged claim that it had in this Court, and which had been ruled by this Court to be improper, he went to New York and filed a common law suit on substantially the same thing which had been denied by this Court. That case is pending up there in the New York Court, and to permit an interrogation of this witness before this Court in a case in which he is not concerned, might very well be prejudicial to the trial of that case up there.

The Court:

I have been quite interested in the matter presented. It involves a very interesting question as to the right of a witness who does not claim immunity because of any self-incrimination, the right of a witness to refuse to answer a question in litigation to which he is not a party. I do not think the right arises out of any constitutional provision, and so far as I know there is no statutory provision under the Florida Statute, and in the absence of a Federal Statute the Florida Statute would prevail, but it is a privilege asserted because of the partnership of which this witness is

a member, being a party defendant to other litigation. I think the asserted privilege is entirely sufficient to warrant, and I so hold that it is sufficient to withdraw the consent that was given to the attorney to interrogate the witness by question and answer form to develop his proffer. The defendant is allowed to make his proffer, if he so wishes, but the privilege is recognized by the Court and the witness will not be required to answer the questions under the circumstances herein disclosed.

Mr. Blackwell:

We have invoked Rule 43-B and have called this witness as an adverse witness and as an unwilling witness, and we have proposed to undertake to cross examine him and ask him leading questions, and subsequently to impeach him and contradict him if we have occasion to do so, and we renew that offer, renewing our offer to make the record on that basis. As I understand, your Honor has denied us that privilege.

The Court:

That is correct.

Mr. Blackwell:

So I do not understand that it is incumbent upon us to proceed further in view of this ruling.

The Court:

I understand that Mr. Seelman was on the stand yesterday and the same situation was asserted.

Mr. Baugher:

That is correct.

The Court:

I make the same ruling.

Mr. Blackwell:

We offer to interrogate this witness under the provisions of Rule 43-B as a hostile and adverse witness and as an

unwilling witness; we also propose to cross examine him concerning the subject matter of the litigation that is now before the Court, with the right to contradict him and impeach him pursuant to the rules, on the same basis as our proposal to cross examine and to likewise impeach the witness Fatio, and we ask the Court to rule upon our right to so proceed in view of this witness' claimed privilege.

The Court:

The proffer will be denied.

Pages 636-637:

The Court:

You may proceed.

Mr. Blackwell:

I wish to propound this question to Mr. Fatio. Mr. Fatio, the defendant has recalled you to the stand to propound to you another question, as follows: Do you claim or contend that any testimony that you might give in this case concerning architect's certificates or otherwise might tend to incriminate you?

The Court:

Do you care to answer that, Mr. Fatio?

Mr. Fatio:

I wouldn't know how to answer it.

The Court:

Do you understand what incriminate means?

Mr. Fatio:

No, sir.

The Court:

All right; I will let your attorney tell you in open Court what it means.

Mr. Baugher:

'Incriminate' means that it might possibly involve you in a criminal prosecution; that is, that your disclosure might be such that you could be charged with a crime.

Mr. Fatio:

I don't think it would incriminate me.

Mr. Blackwell:

That is all.

Pages 637-641:

Mr. Blackwell:

Call Mr. Seelman.

The Court:

Before Mr. Seelman is called I want the record unqualified and without any confusion to reflect the rulings of the Court. When Mr. Fatio was first offered as a witness by the defendant, the defendant called to the Court's attention Rule 43 of the Rules of Civil Procedure, Sub-section B, and claimed the right to examine Mr. Fatio as an adverse and unwilling witness. The Court then dealt with the question of adversity and held that there was, as to the matters now before the Court, no adversity between the claim of Treanor & Fatio and this inquiry. Treanor & Fatio are adverse to Franklinville Realty Company so far as their intervention is concerned, but they are not adverse in so far as the litigation between Franklinville Realty Company and Arnold Construction Company is concerned under this rule. The Court then held that, notwithstanding the lack of adversity, that the Court would recognize the statement made by defendant's counsel as to Mr. Fatio being an unwilling witness and incorporating that feature of tender and the Court held that the statement would be recognized and Mr. Fatio could be interrogated as an unwilling witness and therefore subject to leading questions. Thereafter the defendant declined to proceed with the witness thus tendered

without the right to impeach or contradict. The defendant then offered to examine Mr. Fatio under sub-section C of the same Rule 43, which section deals with a record being made of excluded evidence. In connection with the making of that record Mr. Blackwell, in response to a question by the Court, stated that he would like to develop the proposed tender of excluded evidence by question and answer form, and that was granted. The examination then proceeded, during which Mr. Fatio asked the Court as to whether his statements made in response to questions would be binding on parties in certain litigation now pending in New York State. That is the first information the Court had of any such litigation, and the witness was granted the right to have his counsel appear, and that matter was deferred, so far as the ruling was concerned, until the succeeding day, which was yesterday. On the claim being affirmatively made by the witness, through counsel, the Court, in the exercise of its discretion, revoked the privilege granted to the defendant to develop the proffered testimony or excluded evidence by question and answer form. My understanding of the record is that the witness has never been offered by the defendant, except as a hostile, unwilling and adverse party, and with the witness tendered thereafter as a hostile, unwilling and adverse party, the tender of the witness in that capacity was denied by the Court.

The defendant has the right, if he is not satisfied with the record as setting forth their tender of what the witness would state by their own statement, or what an excluded witness would testify to—they have the right to make that tender, but not by the development of the proffer by question and answer form. That is my recollection of the record, and it may not heretofore have been presented just in that form, where the whole matter is dealt with in one ruling of the Court. Those are my reasons, whether I am right or wrong.

Mr. Blackwell:

Are you ready for us to proceed now?

The Court:

Yes.

Mr. Blackwell:

Mr. Seelman, the defendant has called you to the witness stand to answer this question: You are asked to state whether or not you claim or contend that any testimony that you might give in this case concerning the architect's certificate or otherwise might tend to incriminate you.

Mr. Seelman:

I do not.

Mr. Blackwell:

You do not so contend?

Mr. Lake:

Do you make the same ruling, your Honor?

The Court:

Yes.

Mr. Baugher:

Are you through with this witness?

Mr. Williams:

For the present.

Mr. Baugher:

May I ask the Court, if they are finished with them, that they be excused. They were called here by the defendant and under their subpoena.

Mr. Blackwell:

We see no reason to keep them here further, your Honor.

The Court:

All right; they may be excused.

(7)

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# Supreme Court Of The United States

## OCTOBER TERM, 1942

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## No. 819

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FRANKLINVILLE REALTY COMPANY, *Petitioner,*

*—vs.—*

ARNOLD CONSTRUCTION COMPANY.

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**ANSWER TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI**

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BERT WINTERS,
PAUL W. POTTER,
*Counsel for Respondent.*

I.

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**ANSWER TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States Supreme Court, and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

I.

## INTRODUCTORY STATEMENT

This suit was filed in the State Court during 1937 for the foreclosure of a contractor's lien under an agreement whereby the owner agreed to pay all costs of the structure,

after the issuance of architect's certificates, plus a contractor's fee of $3,000.00 (R. 9-73). It was removed to the Federal District Court by Appellant, which, in its answer (R. 120-131) contended that, under its interpretation of the contract documents, it had overpaid the contractor. There were no allegations of fraud or bad faith on the part of the contractor.

The cause was referred to a master to hear the evidence and make findings (R. 173-174). He found for the contractor (R. 183-187). The District Judge, after argument, re-referred the case for additional findings (R. 1052-1054). The master again found for the contractor (R. 1089-1117), after which the District Judge again heard argument (R. 1126-1140) and entered a final judgment against the owner for a substantial portion, but not all, of the contractor's claim (R. 1141-1146).

An appeal was taken to the Circuit Court of Appeals which remanded the case for one purpose only—" * * * "for further proceedings limited to the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job, and whether or not the materials listed were actually used, or specially fabricated for use in the building." *(Franklinville Realty Company v. Arnold Construction Company,* 120 Fed. (2d) 144).

The District Judge appointed an Auditor who read the record of the former trial and sat with the trial judge during the taking of additional evidence, after which he filed his report in favor of the contractor (R. 2d, 661-672),

and the Court again entered judgment for said Appellee (R. 2nd, 683-691, 695-702).

During the course of the second trial, the Court did not restrict the Appellant-owner in the introduction of evidence concerning the contract and its performance by the contractor, but did refuse to permit said Appellant to examine, as adverse parties, the members of the architectural firm employed by said owner, since it appeared that a severance had been obtained, before the first trial, as to said architects' intervention (R. 180-181; R. 2nd, 545-547) and, at the time of said attempted examination, there was a suit pending in another Federal District Court, brought by said Appellant-owner against said architects for damages (R. 2nd, 550-555; 632-641). Appellant had insisted upon the right to examine said architects as adverse parties, without being bound by their testimony insofar as it related to the contractor's claim, and without showing that it would have any material bearing upon the contractor's suit, nor proffer as to what said owner expected to disclose by the testimony of said witnesses (R. 2nd, 638-640).

Without amending its pleadings, Appellant attempted to show, during the second trial, that the Appellee-contractor was guilty of fraud and bad faith, but, as heretofore stated, the trial judge, who, with the auditor, heard the evidence, entered a judgment for the contractor.

Upon a second appeal to the Circuit Court of Appeals, Fifth Circuit, the judgment was affrmed (R. 2nd, 715-717)

and petition for rehearing (R. 2nd, 719-725) denied (R. 2nd 726).

II.

## ERRORS IN PETITIONER'S STATEMENT OF RECORD

Petitioner's statement of the case is hardly exact. The judgment of the District Court first appealed from was not "set aside" as recited (Petition p. 2) but was "remanded for further proceedinfs in conformity with this opinion." *(Franklinville Realty Company. v. Arnold Construction Company,* 120 Fed. (2d) 144.)

The original letter of the contractor dated March 19, 1937, did not propose to do the work "on a fair value basis" as stated by petitioner (Petition p. 3) but "for a total fee of three thousand dollars above all costs involved in construction of the project mentioned" (R. 921).

The record does not support the statement that the architects certificates were "improvidently issued." The requisitions and certificates were regularly issued and copies delivered to owner's representatives (R. 393-395).

It is true the District Court permitted the architects, Treanor and Fatio, to intervene (Petition p. 4), but petitioner fails to tell the Court that during the first trial and before the master made his findings, the District Court entered an order of severance as to the architect's (R. 180) and that during the trial no evidence was adduced before

the master with respect to the controversy between the owner and the architects (R. 186-187).

The petition also fails to state that the defendant cross-examined the witness Seelman during the first trial and had ample opportunity to develop any matter upon which he desired to question the witness (R. 424-430).

The petition also fails to state that during the course of the first trial the petitioner called witness Fatio as its witness and sought to examine him under the provision of Paragraph B of Rule 43 and that at said time counsel for the owner admitted that the witness was "not adverse at all as far as the plaintiff's case is concerned" but that in the interest of saving time and while the witness was there, he desired "to interrogate him to ascertain for our benefit, and for the benefit of this court, what records are in existence so as to lay the basis for the filing and serving of a notice to admit and produce certain documents in connection with the Treanor and Fatio intervention, as well as the Arnold Construction Company claim" (R. 523-527).

The petition also fails to state that the witness Fatio was recalled by the petitioner and testified during the course of the first trial (R. 805-810).

Examination of the entire record will disclose that the only witness during the first trial whose cross-examination was restricted by the ruling of the master that the architect's certificates are conclusive was witness J. Y. Arnold and that the Court, upon the second trial, permitted the further cross-examination of the witness by

the petitioner (R. 2nd, 39; 56-157; 164-211). The Court further stated that the ruling was not to interfere with the right of the defendant to go into the matter as combatting the prima facie effect of the architect's certificates (R. 2nd, 36-39).

III.

## JURISDICTIONAL STATEMENT

The petition does not disclose any special or important reason for a review of the case by this Court or harmful error by the Trial Court.

IV.

## ANSWER TO QUESTIONS PRESENTED BY PETITIONER

### QUESTION ONE

The defendant was not denied due process by the District Court in denying his motion for leave to recall plaintiff's witnesses for further cross-examination. The only witness whose cross-examination was precluded by the ruling that the architect's certificates are conclusive was witness J. Y. Arnold, and the Court, upon the second trial, permitted further cross-examination of the witness by the petitioner (R. 2nd, 39; 56-157; 164-211). Full cross-examination of plaintiff's other witnesses was permitted at the first trial.

When a case has been decided on appeal and remanded to the trial court, the latter has no authority without leave of the appellate court to re-try the case or to enlarge the issues beyond the purpose for which it was remanded.

*Sanford Fork & Tool Company*, 160 U. S. 247; 40 L. Ed. 414;

*City of Orlando v. Murphy* (C. C. A. 5th 1938), 94 Fed. (2d) 426;

*Seagraves v. Wallace* (C. C. A. 5th), 69 Fed. (2d) 163; *Peavy-Byrnes Lumber Company v. Com'r Fifth Circuit*, 86 Fed. (2d) 234.

QUESTION TWO

The record does not disclose that the defendant was denied the privilege of proper cross-examination of any witness.

QUESTION THREE

Petitioner was not denied a substantial essential right by the refusal of the District Court to permit petitioner to interrogate the architects as adverse parties under Rule 43B of the Rules of Procedure. The Court granted the defendant the right to examine the witness Fatio as an unwilling or hostile witness by propounding leading questions to him (R. 2nd 545). The same is true as to witness Seelman (R. 2nd 554). The historic limitation upon

the scope of cross-examination to the subject matter of the direct examination was not changed by the new rules and is still observed in the Federal Courts. *Moyer v. Aetna Life Insurance Company*, 126 Fed. (2d) 141-143.

## QUESTION FOUR

The rights of plaintiff existing by virtue of Rules 43B and 43C were not impaired by the Court's refusal to permit cross-examination of Fatio and Seelman. Fatio was never plaintiff's witness. Opportunity was afforded the defendant at the first trial to cross-examination witness Seelman (R. 424-430).

## QUESTION FIVE

This question is based upon the false premise that the architect's certificates were impeached and discredited. The finding of the special master at the first trial, the judgment of the District Court, the judgment of the Circuit Court of Appeals on the first appeal, the judgment of the District Court on the second hearing, and the final judgment of the Circuit Court of Appeals on the second appeal are conclusive that the architects certificates were not impeached and discredited.

## QUESTION SIX

Petitioner's sixth question is likewise based upon a false premise. The defendant was not precluded from showing that said certificates were improperly and collu-

sively issued (R. 2nd, 36 and 37), and no evidence was given of collusion between the contractor and the architects.

## QUESTION SEVEN

This question is likewise based upon a false premise. The contract in question was not a 'reasonable cost and fair value" building contract but was one for a "fee of $3,000 above all costs involved in construction of the project mentioned." The architect's certificates were not given the "effect of controlling evidence" but were merely prima facie and the defendant was given ample opportunity in which to discredit and impeach the certificates.

## QUESTIONS EIGHT, NINE, TEN AND ELEVEN

The Circuit Court of Appeals did not deny petitioner due process and equal protection of law by remanding the case to the District Court for "the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job." This suit is upon a written contract and not for quantum meruit.

The defendant was not denied due process of law by refusing to treat this case as one on quantum meruit. Findings in which a Federal District and Circuit Court of Appeals have concurred will be accepted by the Supreme Court where they are not shown to be erroneous or unsupported by evidence. *Virginian Railway Company v. System Federation No. 40, etc.*, 300 U. S. 515; 81 L. Fed. 789.

### QUESTION TWELVE

The decisions of the Supreme Court for the State of Florida concerning the enforcement of the Florida Mechanics' Lien Act are not in conflict with the decision of the Circuit Court of Appeals in this case. In the case of *Langford v. Read*, 69 Fla. 198; 68 So. 723, the contractor was denied recovery on account of fraud in putting in a sham bid on the work performed by him. In *Alshire v. Palmer*, 119 Fla. 335; 161 So. 559, the evidence showed that the contractor had purposely padded material and labor accounts and therefore was denied recovery. In *Chapman v. St. Stephen's Protestant Episcopal Church and the Trustees of the Diocese of South Florida*, 10 So. (2d) 324, the record showed many items of labor and material claimed by the contractor were not furnished for the job and that the plaintiff failed to meet the burden of proof required of him.

## V.

## CONCLUSION

It is further respectfully submitted that plaintiff's petition should be denied.

Respectfully submitted,

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